STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	)	
	)	**No. 01-0423**
Petition for approval of delivery services tariffs and tariff revisions and of residential delivery services implementation plan, and for approval of certain other amendments and additions to its rates, terms and conditions.	)	

ILLINOIS POWER COMPANY'S RESPONSE TO
JOINT MOTION TO STRIKE

Illinois Power Company ("Illinois Power" or "IP"), by its attorneys, submits this response in opposition to the Joint Motion to Strike ("Joint Motion") filed by AES NewEnergy, Inc., Blackhawk Energy Services, L.L.C., Dominion Retail, Inc., Enron Energy Services, Inc., the Building Owners and Managers Association, and the National Energy Marketers Association ("Movants"). Illinois Power is responding only to that portion of the Joint Motion wherein the Movants contend that §16-111 of the Public Utilities Act ("Act"), 220 ILCS 5/16-111, prohibits the Commission from authorizing Commonwealth Edison Company ("ComEd") to increase its nonresidential delivery services rates in this proceeding, or at any time during the "mandatory transition period" (as defined in §16-102 of the Act, 220 ILCS 5/16-102) subsequent to the initial establishment of nonresidential delivery services tariffs ("DST") for ComEd.[1] The Movants' contention is based on faulty and incomplete statutory construction, and must be rejected.

Under Article IX of the Act, a public utility may file proposed revisions to its current tariffs at any time. The public utility is required to file the proposed revised tariffs with the

[1] The mandatory transition period runs from the effective date of the 1997 amendments to the Act through January 1, 2005. 220 ILCS 5/16-102.

Commission at least 45 days prior to their proposed effective date (unless the utility files a petition with the Commission requesting a different effective date). 220 ILCS 5/9-201(a). The Commission may suspend the effectiveness of the proposed revised tariffs for up to 105 days, and then for an additional six months, while it conducts an investigation. 220 ILCS 5/9-201(b). If the Commission does not suspend the proposed revised tariffs, they go into effect 45 days after filing. Id. However, if the Commission does enter into a hearing concerning the propriety of the proposed revised tariffs, then "the Commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable." 220 ILCS 5/9-201(c). Similarly, §9-250 provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith . . .are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall establish the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided. (220 ILCS 5/9-250)

Section 16-111 of the Act imposes certain limitations, during the mandatory transition period, on the exercise by electric utilities and the Commission of the general power and authority to file for and authorize changes in existing tariffs. Specifically, §16-111(a), on which Movants rely, provides in relevant part that

> During the mandatory transition period, notwithstanding any provision of Article IX of this Act, and except as provided in subsections (b), (d), (e) and (f) of this Section, the Commission shall not (i) initiate, authorize or order any change by way of increase (other than in connection with a request for rate increase which was filed after September 1, 1997 but prior to October 15, 1997, by an electric utility serving less than 12,500 customers in this state), (ii) initiate or, unless requested by the electric utility, authorize or order any

> change by way of decrease, restructuring or unbundling (except as provided in Section 16-109A), **in the rates of any electric utility that were in effect on October 1, 1996**, or (iii) in any order approving any application for a merger pursuant to Section 7-204 that was pending as of May 16, 1997, impose any condition requiring any filing for an increase, decrease or change in, or other review of, an electric utility's rates or enforce any such condition of any such order; provided, however, that this subsection shall not prohibit the Commission from: . . . . (220 ILCS 16-111(a); emphasis supplied)

The phrase "in the rates of any electric utility that were in effect on October 1, 1996" applies to both the prohibition on increases in clause (i) and to the prohibition on decreases, unbundling and restructuring in clause (ii), in the rates of an electric utility. If the phrase "in the rates of any electric utility that were in effect on October 1, 1996" did not apply to clause (i), then that clause would make no sense – the phrase "any change by way of increase" n clause (i) would not apply to anything. Only by recognizing that the phrase "in the rates of any electric utility that were in effect on October 1, 1996" applies to both clause (i) and clause (ii) can clause (i) be read coherently.[2]

[2] Movants erroneously relate the concluding phrase in clause (iii), "an electric utility's rates or enforce any such condition of any such order", to clause(i). (Joint Motion, par. 2a) Clause (iii) is completely self-contained and deals with a unique topic: it serves to prohibit the Commission, in any order under §7-204 approving an application for a merger involving an electric utility that was pending on May 16, 1997, from imposing certain conditions relating to the electric utility's rates that the Commission would otherwise have authority to impose under §7-204, or from enforcing any such condition of any such order. Clause (iii) was added to §16-111(a) to address a particular merger proceeding that was pending during 1997, to prevent the Commission from in effect bypassing the prohibitions on rate increases and decreases in subparagraphs (i) and (ii) by requiring the electric utilities involved in that merger to increase or decrease their electric rates as a condition of approval of the merger. See Report to the Senate President by the Illinois Commerce Commission, Analysis of Electric Restructuring with Particular Emphasis on Senate Bill 55, Aug. 15, 1997, p. 45. Moreover, for the last phrase in clause (iii) to logically apply to clause (i), the word "in" would need to appear before "an electric utility's rates", but it does not. Finally, the last phrase of clause (iii) cannot apply to clause (i) because it would then also have to apply to clause (ii), with the result that the end of clause (ii) would read, nonsensically, ". . . in the rates of any electric utility that were in effect on October 1, 1996 an electric utility's rates or enforce any such condition of any such order." In short, Movants' parsing of §16-111(a) in paragraph 2a of the Joint Motion is nothing but a misleading use of ellipses.

ComEd's nonresidential delivery services rates were not "in effect on October 1, 1996." In fact, ComEd's nonresidential DSTs were not in effect until October 1, 1999, the date on which ComEd was first required to offer delivery services to certain nonresidential customers. Thus, the prohibition on the Commission authorizing any increase in certain rates of an electric utility during the mandatory transition period, imposed by clause (i) of §16-111(a), does not apply to ComEd's non-residential delivery services rates.[3]

Although analysis of the language of the first paragraph of §16-111(a), as quoted and discussed above, is sufficient to demonstrate that its prohibition on increases in certain electric utility rates during the mandatory transition period does not apply to delivery services rates, the "exceptions" listed in subparagraphs (1) through (4) of §16-111(a) also demonstrate that the Commission is not prohibited from authorizing increases in ComEd's nonresidential delivery services rates during the mandatory transition period. Specifically, subparagraph (3) states that the Commission is not prohibited from "ordering into effect tariffs for delivery services and transition charges in accordance with Sections 16-104 and Sections 16-108 . . . ." Further, subparagraph (4) states that the Commission is not prohibited from "ordering or allowing into effect any tariff to recover charges pursuant to Sections . . . 16-108 . . ."

[3] The distinction between an electric utility's rates that were in effect at the time Article XVI of the Act was enacted and the electric utility's delivery services rates is also recognized in §16-103 of the Act, "Service obligations of electric utilities". Section 16-103(a) states the electric utility's obligation to "continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this amendatory Act of 1997." Section 16-103(b) separately states the electric utility's obligation to offer, as tariffed services, delivery services in accordance with Article XVI, the power purchase option described in §16-110, and real-time pricing as described in §16-107. Each of these is a new service required by Article XVI.

Turning to the Sections referenced in subparagraphs (3) and (4) of §16-111(a), §16-104(a) states that "Each electric utility shall offer delivery services to retail customers located in its service area in accordance with the following provisions", and then states various dates by which an electric utility must offer delivery services to various segments of the retail customers in its service area, culminating with "On or before December 31, 2000, the electric utility shall offer delivery services to all remaining non-residential retail customers in its service area." 220 ILCS 5/16-104(a).

Section 16-108(a) in turn requires an electric utility to file a DST with the Commission at least 210 days prior to the date that the electric utility is required to begin offering delivery services. Section 16-108(a) specifies that the electric utility shall provide the components of delivery services that are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC") at the same prices, terms and conditions set forth in its applicable tariff as approved or allowed into effect by FERC. However, §16-108(a) goes on to state that "The Commission shall otherwise have authority pursuant to Article IX to review, approve, and modify the prices, terms and conditions of those components of delivery services not subject to the jurisdiction of the [FERC] . . ." 220 ILCS 5/16-108(a). Further, §16-108(b) states:

> The Commission shall enter an order approving, or approving as modified, the delivery services tariff no later than 30 days prior to the date on which the electric utility must commence offering such services. **The Commission may subsequently modify such tariff pursuant to this Act.** (220 ILCS 5/16-108(b); emphasis supplied)

As described at the outset of this Response, Article IX empowers the Commission to investigate tariffs filed by a public utility, and based upon such investigation to order increases, decreases or other revisions to those tariffs. The references in §16-111(a)(3) and 16-111(a)(4) to §16-108,

and the language of §16-108(a) and (b), make it clear that during the mandatory transition period, the Commission has its full Article IX powers to increase, decrease or otherwise revise the delivery services tariffs of an electric utility.[4]

In addition to the language of the relevant sections of the Act, which make it clear that the Commission has the authority during the mandatory transition period to authorize increases in ComEd's nonresidential delivery services rates, Illinois Power submits that the statutory interpretation advanced by the Movants is illogical. Movants' statutory interpretation is illogical in light of the requirements of §16-104 and 16-108 that each electric utility's initial nonresidential delivery services rates must be approved and in place by October 1, 1999, and that its initial residential delivery services rates be approved and in place by May 1, 2002. Given the well-established test year concept, which has been recognized by the courts, and of which the General Assembly must be deemed to have been aware in amending the Act, adoption of Movants' position would mean that the revenue requirement used to establish the residential DSTs would have to be based on a test year two to three years later than the test year used to establish the nonresidential DSTs. Given the numerous protections for residential customers contained in the Customer Choice Law, it would be illogical and unreasonable to conclude that the General Assembly intended for ComEd's residential delivery services rates to be based on a different, and almost certainly higher, revenue requirement than ComEd's nonresidential DSTs, during the period 2002 – 2004.

[4]Consistent with the full range of its Article IX powers, the Commission would not be restricted to allowing an increase or decrease in an electric utility's delivery services rates solely upon the request of the utility. The Commission could also initiate an investigation on its own motion, at any time during the mandatory transition period, to, for example, determine whether an electric utility's existing delivery services rates should be decreased.

WHEREFORE, for the reasons set forth above, the Joint Motion to Strike should be denied insofar as it is based on the assertion that the Commission is prohibited from authorizing any increase in Commonwealth Edison's nonresidential delivery services rates during the mandatory transition period. Illinois Power Company takes no position on any other aspects of the Joint Motion to Strike.

Respectfully submitted.

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